**LYE THEAN SOO & ORS.**

**v.**

**SYKT. WARSAW**

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
HARUN HASHIM SCJ
MOHD. JEMURI SERJAN SCJ
[SC CIVIL APPEAL NO. 410 OF 1985]
17 AUGUST 1990

***LAND LAW:*** *Right of way - Whether public or private - Whether by dedication or statute.*

***CIVIL PROCEDURE:*** *Issues decided before trial Judge - New issues cannot be raised on appeal.*

The third defendant and C acquired Lot A which had a frontage on Road Z (which was a result of amalgamation of Lots X and Y); this lot was subdivided into 16 smaller lots, namely Lot Nos. 1255 - 1270 and Lot 1277. As there was no road access to Rd. Z, Lot 1277 was reserved as a path to the other lots. The 3rd defendant sold all the lots except for Lot 1277. The 1st and 2nd defendant purchased Lots 1255 and Lot 1264 respectively.

The plaintiff as sand mining and land contractors had entered into agreements with various landowners to mine, work, win and take away sand from their holdings. Entry to their holdings was by way of Lot 1277. The plaintiffs alleged that the defendants obstructed this access road. The question for the Court was whether Lot 1277 was a public highway prior to 1957 and after 1957. On the evidence the learned trial Judge held that Lot 1277 was a public highway both before and after 1957; however he died before a written judgment could be delivered. The defendants tried to raise new issues which were never advanced before the late trial Judge, arguing that the question of credibility of witnesses did not arise.

Observations on what constitutes a public right of way and how they arise.

**Held:**

**[1]** It was too late to raise the new issues now as this should have been done before the trial Judge; it was quite clear that on the evidence adduced, the trial Judge was clearly satisfied that a path existed on Lot 1277 and that it was frequently used by the public and was enjoyed as of right and without interruption over a considerable period until 1975 when the defendants objected to the users.

**[2]** The facts and evidence adduced prove that Lot 1277 was dedicated to the public by way of common law use.

*[Appeal of defendants dismissed.]*

**Cases referred to:**

*Datin Siti Hajar v. Murugasu [1970] 2 MLJ 153*
*Goodson v. Richardson [1874] LR 9 Ch 221*
*R. v. Pratt [1855] 4 E & B 860*
*Harrison v. Duke of Rutland [1893] 1 QB 142*
*Hickman v. Maisey [1900] 1 QB 752*
*Folkestone Corporation v. Brockman [1914] AC 338*
*Attorney-General v. Esher Linoleum Co. Ltd. [1901] 2 Ch 647*

*For the appellants - R.J. Manecksha (Ranjit Singh with him); M/s. Jag-Jit Singh & Co.*
*For the respondent - Lim Kean Chye; M/s. Lim Kean Chye & Co.*

**JUDGMENT**

**Lee Hun Hoe CJ (Borneo):**

This is an appeal against the decision of the late Arulanandom J given on 1 October 1980 on liability and the decision of Edgar Joseph Jr. J, given on 31 October 1985 on quantum. The Senior Assistant Registrar assessed damages at RM400,000 as appeared from his certificate dated 21 April 1984. The defendants, consenting to a final order on the application of the plaintiffs incorporating the Senior Assistant Registrar's assessment, Edgar Joseph Jr. J, on 10 July 1986 adjudged that the defendants do pay the plaintiffs RM400,000 and costs of the inquiry to be taxed.

The plaintiffs are in the business of sand mining and sand contractors. They sued defendants jointly for damages for conspiracy to create a nuisance, that is, to injure them and individually for obstruction. They entered into agreements with various landowners to mine, work, win and take away sand from their holdings. Entry to their holdings was by way of an access road known as Lot 1277 which for many years had been reserved for road and set aside as such and used by public as such. Although Lot 1277 was surrendered to the Government the Government had not taken it over. They claimed that the defendants wrongfully and maliciously conspired and combined amongst themselves, with intent to injure their business, by obstructing the access road and prevented their lorries and other vehicles transporting sand from going in and coming out from their holdings.

The defendants denied the claim. It appears that Tan Soon Keat, deceased, who was the 3rd defendant at the trial and Chew Eng Eam acquired Lot 1239 which had a frontage on Relau Road, Penang to the south of it. Lot 1239 was the result of the amalgamation of Lots 69 and 79 Pt.I of Mukim 13. In 1957 they applied for subdivision of this lot. It was subdivided into 16 smaller lots, namely, Lot Nos. 1255 to 1270 (15 lots) and Lot 1277 (1 lot).

The subdivision was such that except for subdivided Lots 1263 and 1270 they had no road access to Relau Road and it was therefore necessary to provide for such access by the reservation of a strip of land which will provide a frontage for these subdivided lots. The strip of land or path became Lot 1277. The 3rd defendant retained Lot 1277 and the remaining lots were sold. The 1st defendant bought Lot 1255 and the 2nd defendant Lot 1264.

The 3rd defendant averred that he exercised his right of entry to Lot 1277 which he granted to the occupiers of the subdivided lots only with his consent. He further averred that he had no intention of allowing the general public access to the said lot. But the evidence would seem to suggest otherwise. He said after the plaintiffs were denied entry on 4 September 1975 they sought his consent and approval to allow them entry but he refused. As a result, they applied to the Registrar of Lands, Penang and eventually successfully obtained a Collector's right of way on 3 March 1976. Since then he had not interfered with their use of the said lot.

It was suggested that the plaintiffs could have access though Lot 353 though it might incur heavy expenses of constructing a road for vehicular traffic. Thus there is no jurisdiction for regarding Lot 1277 as a way of necessity. The defendants maintained that the access was meant for the subdivided lots and that there never was dedication as a public road.

Before the late Arulanandom J the parties agreed that there were two issues: (i) was Lot 1277 a public highway prior to 1957? (ii) was Lot 1277 a public highway after 1957? On the evidence the learned Judge gave judgment for the plaintiffs. Unfortunately, he died on 22 February 1982 before he could give a written judgment. It is clear that he answered the two issues in the affirmative. However, before us Encik Manecksha for defendants disagreed that there were two issues. He said the question was whether there was a cause of action at the time of the issuance of the writ on 13 August 1975. Further, whether the subdivision in 1957 resulted in creating a public right of way in respect of Lot 1277. If it did not, then the relevant date is the date of issuance of the writ. It follows that if between 1957 and 13 August 1975 no right of way had been created, then the plaintiffs clearly had no cause of action.

Encik Manecksha submitted that he was entitled to raise the new issues which were never advanced before the learned Judge. He said the credibility of the witnesses did not arise. The memorandum of appeal specifies three grounds. The two main grounds of appeal are that the learned Judge was wrong to find that Lot 1277 was a public highway and that he was wrong in finding that there was a conspiracy to create a nuisance and interfere with the business of the plaintiffs. Having agreed to the two issues before the learned Judge it is too late in the day to say that he disagreed with the two issues. The proper time to raise the new issues was before the learned Judge. It is not proper for us to consider the new issues for obvious reasons. The evidence adduced before the learned Judge was clearly directed to the two issues then being argued and the examination of the witnesses was, no doubt, also directed to those issues as they then stood. In our judgment it would be quite unreal to ask the learned Judge to determine the new issues without reopening the whole of the evidence and if necessary giving both sides an opportunity to call further evidence. Moreover, it would not be right for us to determine the new issues without the appropriate finding of facts by a trial Court.

We do not agree with the defendants that the credibility of witnesses does not arise. In this case we are not dealing with the question of an easement or the National Land Code. We are concerned, as the learned Judge was, with a situation prior to the coming into force of the National Land Code. The case of *Datin Siti Hajar v. Murugasu* [1970] 2 MLJ 153 which is concerned with the question of easement is not really applicable. The public right of way does not necessarily exist over a road even where the public are in the habit of passing it. The question of what constitutes a public right of way may well come into issue as in this case. The plaintiffs have assumed the responsibility to show that there exists a public right.

A right of way may be described as a right passing over someone else's property. The right carries with it no interest whatsoever in the soil of the land, which remains the property of the owner, although as was said by Lord Selborne L.C. in *Goodson v. Richardson* [1874] LR 9 Ch 221 "he cannot use the soil, or deal with it by breaking it open, or in any other manner, so as to interfere with the use of it ...". The owner of the land over which the way passes is entitled, however, to prevent its surface being used in any manner or for any purpose other than that of passing and re-passing.

Rights of way are either public or private. Easement has been loosely and inaccurately used to define a public right of way. Strictly speaking, it is more appropriate to use it in respect of private right, which is an 'easement' or incorporeal right in the nature of a privilege which has been created by grant or by reservation or by prescription. A public right of way lacks the essential requirement of a dominant tenement for the benefit of which the right is exercisable.

Any public right of way of any width may be said to be a highway. The grant of a right of way is merely a right of passing and re-passing (whether it be of footway, path, carriageway or otherwise). The public acquire by dedication no right of property in the soil. The owner of the soil, after dedication, retains all his rights in the soil and may exercise those rights just as he pleases so long as he does not interfere with the public right of passing and re-passing along the surface. The owner still retains very important advantages. See *R. v. Pratt* [1855] 4 E & B 860; *Harrison v. Duke of Rutland* [1893] 1 QB 142; and *Hickman v. Maisey* [1900] 1 QB 752.

The plaintiffs have called various witnesses to support their claims. The lack of local authorities is no reason to deter the Courts from deciding whether a public right of way exists or not on the evidence adduced.

Haji Karim bin Mohd. Hussain (PW2), a retired Government servant stated at p. 28 of the Appeal Record:

> ... I joined Government in 1938. My first job was land bailiff. Covering Relau area. P9 of A2 shown to witness. I knew the area from 1938. It was 69 & 79 Pt.11. It was subdivided in 1956 or 57. Lot 1277 shows road reserve. There is a Malay Kampong. It is on Lot 1264, 1265, 1266, 1255, 1251. It is Kampong Paya, Relau. There was a path in 1938 where Lot 1277 is. The path comes to Relau Road at the bottom of the plan. The path stops at the boundary of the land then another path goes further into Kampong Paya. The present road almost takes up the same path in 1938. It was an old path. The path was open to the public until now. No one obstructed the road. In my opinion it was a public road.

Osman bin Din (PW3), a poultry rearer, testified at p. 29 of the Appeal Record:

> I use the Kampong path. The path has been there all my life. I was born there. The public has been using this road. The path leads up to the hills. There are sand mines up there. Between 65 & 70 there were sand mines and lorries using this path. Lorries went up and down and there was no trouble. Motorcycle also used the road. Bus sekolah also go in and out. I've not seen anybody being stopped. I've heard about the plaintiffs being stopped.

Yussop bin Din (PW4), a woodcutter, stated at p. 30 of the Appeal record:

> I stayed in Relau ten years ago. I used to go to Kampong Paya to gather wood. I could go up and down freely without being stopped. Others too were using the road including vehicular traffic ...

Mat Ariff bin Shariff (PW6) stated at p. 31 of the Appeal Record:

> Born in Relau 65 years, self-employed. Lived there all my life. The road in Kampong Paya is a public road. I have not asked anybody for permission. All manner of vehicles use the road. Outsiders also use the road.

Mat Tuselim bin Kasimon (PW1), the Assistant Collector of Land Revenue, Penang, in answer to the Court at p. 28 of the appeal record, stated:

> ... If a plan for sub-division shows an area for road, it should mean that that area is earmarked for a road reserve. The present practice would be not to give the area a number.

The defendants submitted that the word 'reserve' must be given its ordinary meaning. Until the 'reserve' is taken over by the appropriate authority it is only a road for some future use. Without the consent of the owner a person using the road would be a trespasser.

Encik Lim Kean Chye for the plaintiffs pointed out that the issues before the learned Judge were agreed by the parties. The laws applicable was the Penang and Malacca Titles Act. It was not dealing with Crown Land but freehold and common law rights applied. It was concerned with long user and highway. Public right was in issue not private right. In respect of highway there must be dedication. The witnesses gave evidence implying that there was dedication. The 3rd defendant did not pay the quit rent until after the dispute arose. He said the Land Office should not have accepted it. It is his submission that where there is dedication the owner cannot withdraw what he has already done.

The plaintiffs have produced a succession of users to entertain the Court with their reminiscences. If these were accepted by the Court then a *prima facie* case in favour of dedication would have been established. The question is not only whether on the evidence adduced before the learned Judge he can determine that there has been an exercise of such a right of way as in this case but also whether he can reasonably infer that the owner has a real intention of dedicating that way to the use of the public. That the answer is in the affirmative is clear when he decided the question of liability in favour of the plaintiffs. Quite clearly, he was testified that a path existed in Lot 1277 and frequently used by the public and that the right of way was enjoyed as of right and without interruption over a considerable period until 1975 when the defendants objected to the users. The only defendant who could really object was the 3rd defendant. It was not enough to disprove dedication. The 3rd defendant was under the impression that he was no longer the owner of the land. He even regarded himself merely a nominal owner.

In *Folkestone Corporation v. Brockman* [1914] AC 338, 352 Lord Kinnear laid down the correct method of proving dedication from user in these words:

> Dedication, in my opinion, is a matter of fact ... the nature of user, and consequently the weight to be given to it, varies infinitely in different cases, and whether it will import a presumption of grant or dedication must depend upon the circumstances of the particular case. The law is stated more exactly by Lord Blackburn in *Mann v. Brodie* [1885] 10 App. Cas 378 & 386. He begins by citing the doctrine laid down by Parke B, in *Pool v. Huskinson* [1843] 11 M & W 827 & 830:
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> > In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be ... an *animus dedicandi*, of which the user by the public is evidence and no more.
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> And then he adds more particularly with reference to the effect of user, that:
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> > where there has been evidence of user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find that fact may find that there was dedication by the owner, whoever he was.

Public rights of way may arise in two ways. They are either provided for by statute, or they are created by dedication of the soil to the public use by the owner and acceptance by the public. As Buckley J said in *Attorney-General v. Esher Linoleum Co. Ltd.* [1901] 2 Ch 647 as follows:

> In all these cases of right of way it is necessary to remember that the thing to be established is dedication, not user. A highway is not acquired by user ... In most of these cases dedication, it is true, is proved by user. But user is but the evidence to prove dedication; it is not user, but dedication; which constitutes the highway; ...

In our judgment, apart from legislation, dedication is also a method by which a right of way may be created. It must be remembered that mere public user does not create a highway. The foundation of public right lies in dedication and dedication presumes a dedicator who in this case only be the owner of the land over which the right of way has been granted. In the absence of any definite proof of actual and deliberate dedication the Courts are entitled to adopt the legal fiction of assuming dedication from proved facts.

The defendants denied dedication. It is said that the 3rd defendant merely granted the use to a limited number of persons, that is, those who bought the lots after the subdivision and that he had no intention to dedicate to the public. Nevertheless, the path has been used by public, particularly those living within the vicinity for many years even before he acquired ownership of the land without interruption. He has in fact taken no steps to ensure that a public right of way is not so created. The path has been used and enjoyed by the public as a rights for so many years openly and without interruption and must be known to the owner of the land.

The plaintiffs are merely using the common law method of establishing a public right of way by proof of dedication. The learned Judge was within his right to accept it, and we see no reason to interfere with his decision. Accordingly, we would dismiss the appeal with costs. Deposit to the plaintiffs to account of taxed costs.

Also found at [1990] 2 CLJ 743